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SUPREME COURT, STATE OF MISSISSIPPI

SEPTEMBER TERM, 1948

EDDIE J. VIATOR,

Appellant,

vs.

A. H. STONE, CHAIRMAN, ET AL.,

Appellees

JURISDICTIONAL STATEMENT

Statement in Support of Jurisdiction

The appellant, Eddie J. Viator, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectively represents:

A

Statutory Provisions Sustaining Jurisdiction

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States is Section 344 (a) of Title 28 of the U. S. Code, reading to the extent relevant here, as follows:

"SEC. 344 (a). Final judgment or decree in any suit in the highest court of a State in which a decision could be had * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

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The remedy by writ of error under the foregoing section has been abolished and an appeal substituted in its place by Section 861 (a) of Title 28 of the U. S. Code.

B

Statutes of the State, the Validity of Which Is Involved

The statutes of the State of Mississippi, the validity of which have been sustained by a final judgment of the Supreme Court of the State of Mississippi, the highest court of said State, as not being violative of or repugnant to the Constitution and laws of the United States, are Sections 6 and 8 of Chapter 113, of the Laws of 1938, State of Mississippi, approved April 4, 1938 (Session Laws of 1938, Pages 94, 95, 96 and 97), and Section 1, Chapter 150, of the Laws of 1938, State of Mississippi, approved March 29, 1938 (Session Laws of 1938, Pages 348 and 349). The pertinent provisions thereof are:

"CHAPTER 113

"AN ACT to amend sections 1, 2-f, 3, 5, 7, 8, 9, 10, 11, 15, 16 and 18 of Chapter 119, laws of 1934, as amended by Chapter 158 laws of 1936, so as to clarify and provide more specific requirements for the administration of said act.

* * * * * * *

"Sec. 6. Be it enacted, that section 8 of Chapter 119, laws of 1934, as amended by chapter 158, laws of 1936, be and the same is hereby amended so as to read as follows:

"TAXPAYER MUST KEEP RECORDS—FAILURE TO MAKE RETURNS —DUTY AND POWER OF COMMISSIONER

"Section 8. It shall be the duty of every person engaging or continuing, in this state, in any business for which a

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privilege tax is imposed by this act to keep and preserve adequate records of the gross income, gross receipts or gross proceeds of sales of such business and such other books or accounts as may be necessary to determine the amount of tax for which he is liable, under the provisions of this act, which said records shall be adequate in substance rather than form, to conform to the requirements and regulations promulgated by the commissioner; and all of such records shall be written in the English language. And it shall be the duty of every such person to keep and preserve, for a period of two years, all invoices of goods and merchandise purchased for resale, and all such books, invoices and other records shall be open for examination at any time, by the commissioner or his duly authorized agent.

• • • • • • •

"If adequate records of the gross income, gross receipts or gross proceeds of sales are not maintained or invoices preserved as provided herein, the commissioner may make additional returns and assessments from the best information available, and shall give notice by registered mail of such returns and assessments, and such returns and assessments shall be prima facie correct for the purpose of this act, and the amount of tax shown due thereby shall be a lien against all the property of the taxpayer until discharged by payment and if such tax be paid within ten days after notice by the commissioner, then there shall be added ten per centum as damages and interest at the rate of one per centum per month from the time such tax was due until paid. If payment be not made within ten days after demand therefor by the commissioner, there may be added twenty-five per cent for the first offense and fifty per cent for subsequent offenses as damages together with interest at the rate of one per centum per month on the tax from the time such tax was due. Provided, however, in the event such tax-

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payer, within ten days from the date of such notice, shall by petition in writing state that said return is incorrect, the commissioner shall grant a hearing on such petition and investigate that question fully before proceeding further under this section. • • •

• • • • • • •

"Sec. 8. Be it enacted, that section 10 of Chapter 119, laws of 1934, be and the same is hereby amended so as to read as follows:

"Aggrieved Person May File Petition

"Section 10. If any person having made a return and paid taxes thereon feels aggrieved by the additional assessment made upon him for any year by the commissioner, he may apply to the tax commission by petition, in writing, within ten days after the notice is mailed to him, for a hearing and a correction of the amount of the tax so assessed upon him by the Commissioner, in which petition he shall set forth the reasons why such hearing should be granted and the amount in which such tax should be reduced. The tax commission shall promptly consider such petition, and shall grant such hearing, notifying the petitioner of the time and place fixed for such hearing. After such hearing, the tax commission may make such order in the matter as may appear to it just and lawful, and shall furnish a copy of such order to the petitioner. Any person improperly charged with any tax and required to pay the same, may recover the amount paid, together with interest, in any proper action or suit against the commissioner, and the circuit court of the county in which the taxpayer resides or is located shall have original jurisdiction of any action to recover any tax improperly collected. It shall not be necessary for the taxpayer to protest against the payment of the tax or to make any demand to have the same refunded in order to maintain such

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suit. In any suit to recover taxes paid or to collect taxes the court shall adjudge costs to such extent and in such manner as may be deemed equitable.

"Either party to such suit shall have the right to appeal to the supreme court of Mississippi as now provided by law. In the event a final judgment is rendered in favor of the taxpayer in a suit to recover illegal taxes, then it shall be the duty of the state auditor, upon receipt of a certified copy of such final judgment, to issue a warrant directed to the state treasurer in favor of such taxpayer to pay such judgment, interest and costs. It shall be the duty of the state treasurer to honor such warrant and pay such judgment out of any funds in the state treasury. * * *

* * * * * * *

"CHAPTER 150

"House Bill No. 735

"AN ACT to reorganize the state tax commission, by enlarging, increasing and broadening the duties and responsibilities of the associate commissioners, by giving legal sanction and effect to the duties of ad valorem commissioner and of excise commissioner now being discharged by such associate commissioners, in order to assure greater efficiency of administration, on a more permanent and business-like basis than under the existing law, and to fix the compensation of such ad valorem commissioner and excise commissioner, and to amend section 2 of Chapter 119, laws of 1932.

"Section 1. *Be it enacted by the Legislature of the State of Mississippi,* That section 2 of chapter 119, laws of 1932, be amended to read as follows:

"Section 2. * * * The governor shall designate the other associate commissioner as 'excise commissioner', who

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shall be selected from the state at large, and who shall preferably, though not necessarily, be an attorney at law.

"It shall be the duty of the excise commissioner to familiarize himself with the laws imposing income, sales and other taxes administered by the chairman of the commission. He shall have charge of all appeals from decisions of the chairman to the entire commission, shall arrange the time and place of hearing such appeals, and shall provide for the preparation and presentation to the commission of all evidence, documents, and other matters necessary and proper for a decision on the matters and questions involved in the appeal. The excise commissioner shall, when necessary, direct and supervise the preparation of any record to be filed in any court of the state. When directed by the other members of the commission, and agreed to by the appealing taxpayers, he may hold a hearing on any appeal from a decision of the chairman at the time and place agreed to, and at such hearing shall take the testimony of witnesses, verbally, or in writing, take depositions, and shall have the power to require the production of books and other records and papers which the chairman is authorized to demand or examine, and he shall have authority to make copies of same. At the conclusion of the hearing, the excise commissioner shall submit all written evidence, documents, records and other pertinent information to the other members of the commission, together with a report in writing setting forth a review of the cause and the essential facts of the matter. Whereupon the whole commission, if the appealing taxpayer assents thereto, shall render its decision on the appeal; but if the taxpayer desires a further hearing on the cause, the whole commission shall hear the appeal at its office in the capitol. • • •

• • • • • • •

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"CHAPTER 113

"House Bill No. 668

"AN ACT to amend sections 1, 2-f, 3, 5, 7, 8, 9, 10, 11, 15, 16 and 18 of chapter 119, laws of 1934, as amended by chapter 158, laws of 1936, so as to clarify and provide more specific requirements for the administration of said act.

* * * * * * *

"Sec. 12. Be it enacted, that section 18 of chapter 119, laws of 1934, be and the same is hereby amended so as to read as follows:

"COMMISSIONER OR AGENT MAY EXAMINE BOOKS, ETC.

"Section 18. The commissioner or his authorized agents, may examine any books, papers, record, or other data bearing upon the correctness of any return, or for the purpose of making a return where none has been made, as required by sections 5 and 6 of this act, including the records of any common carrier, bank, wholesale or retail dealer in regard to his own or another's return, and may require the attendance of any person and take his testimony with respect to any such matter, with power to administer oaths to such person or persons. * * *."

C

Date of Judgment and Date of Application for Appeal

The date of the final judgment of the Supreme Court of the State of Mississippi, which is now sought to be reviewed was October 11, 1948. The time for taking the appeal began to run on said date. *Section 350 of Title 28 of the United States Code.*

The date on which the application for appeal was presented and the appeal allowed was January 10, 1949.

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Under the provisions of Section 350, of Title 28 of the United States Code, the Appellant may bring his appeal within three months after the entry of the judgment of the Supreme Court of the State of Mississippi.

D

Nature of Case and Rulings Below

On October 3, 1939, the appellant, Eddie J. Viator, a retail grocer doing business in Gulfport, Harrison County, Mississippi, was additionally assessed for sales tax for the years 1937 and 1938, and given notice in writing of such assessment. The appellant was notified he had been additionally assessed for sales tax and that if remittance was not received within ten days a warrant would issue, with additional penalty added, and sent to the Sheriff of his County to effect collection (Rec. 67). Again, on December 8, 1939, Appellant was additionally assessed for sales tax for the year 1937 and the year 1938, and given notice in writing of such assessment. The notice (Rec. 73) recited that such assessments were made against Appellant "from the best information available in addition to the previous returns and payment of sales tax heretofore made by you for the periods January 1, 1937 to December 31, 1937, and January 1, 1938 to December 31, 1938, by reason of the fact that the records kept by you were not adequate to determine the amount of tax for which you were heretofore liable, which said amended and additional assessments are as shown by copies of returns and assessments hereto attached for said respective years. * * *" Appellant filed his petition for hearing (Rec. 75-80) on December 19, 1939. A hearing was had before the Chairman of the State Tax Commission of Mississippi pursuant to the provisions of Section 6 of Chapter 113 of the laws of 1938, at which hearing, the case against the Appellant was prosecuted by

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counsel for the State of Mississippi representing Appellees, and defended by counsel for the Appellant. In the course of the hearing request was made that the Chairman investigate the matter fully before proceeding further, introduce evidence, and afford subpoenas for witnesses for Appellant. Such requests were refused and denied. After the rendition of an order against him by the Chairman of such Commission Appellant appealed to the entire Commission, and his appeal was heard by the Excise Commissioner, who reported (R. 101-102) on January 12, 1940 that the additional assessments should remain as assessed. No report in writing setting forth a review of the cause and the essential facts of the matter was made by such Excise Commissioner, as required by Section 1 of Chapter 150 of the Laws of 1938. Instead such Excise Commissioner wrote a letter to the State Tax Commission (Rec. 102) in which he said:

"After full consideration of all evidence and matters presented by the taxpayer, it was the opinion of the Excise Commissioner, and concurred in by the District Supervisor, the Field Auditor, and the Attorney for the Commission, that the additional sales tax should remain as assessed."

Following receipt of the letter of such Excise Commissioner, the State Tax Commission of Mississippi (Rec. 103-104-105) notified Appellant that if he desired a further hearing the whole Commission would hear his appeal at its office in the capitol of Mississippi on Friday, January 26, 1940 at 10 o'clock a. m. Appellant filed written objections (Rec. 107-111) to such order of the Commission dated January 12, 1940. Hearing was continued to a future date, and on May 24, 1940 the State Tax Commission of Mississippi entered its Final Order against Appellant (Rec. 115-118) concluding that the assessments should remain as originally assessed. Appellant was then notified (Rec. 119-

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120) that unless he paid the assessments warrant would be placed in the hands of the Sheriff of his County. He was advised that there was no remedy available to him except to pay the tax and file suit in the Circuit Court for its recovery, if he should regard the tax as having been erroneously collected.

Thereupon the Appellant filed his petition for certiorari in the Circuit Court of Hinds County, pursuant to Sections 72-73 Code of 1930 of the State of Mississippi, and from adverse judgment there appealed to the Supreme Court of Mississippi. In his petition for certiorari the Appellant reasonably claimed that *Sections 6, Chapter 113, Laws of 1938, Section 8, Chapter 113, Laws of 1938,* amending the laws of 1934 and 1936, and *Section 1, Chapter 150, Laws of 1938,* as construed and applied against him, denied the Appellant due process of law and the equal protection of the law, in violation of *Sec. 1, Article XIV of the Amendments to the Constitution of the United States* and *Section 14 of the Constitution of Mississippi* (Rec. 167-177).

The Supreme Court of Mississippi made Per Curiam request for additional briefs on the Constitutional question.

The Supreme Court of Mississippi affirmed the judgment of the Circuit Court of Hinds County. (Rec. 152).

On January 12, 1942 the Supreme Court of the State of Mississippi rendered a final judgment against Appellant, affirmed the Circuit Court of Hinds County and the Final Order of the State Tax Commission of Mississippi. *Viator* v. *State Tax Commission,* 193 Miss. 266, 5 So. 2d. 487.

The Supreme Court of Mississippi held that the Order of the State Tax Commission was not unconstitutional, and did not deny Appellant Due Process of Law and the Equal Protection of the Law.

The Court stated in its opinion:

" • • • Another of the Appellant's complaints is that 'there is no presumption in favor of the validity of an

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order unless there is evidence to support such order.' The order referred to is that made by the Tax Commission approving this assessment. Whether this order of the State Tax Commission is supported by evidence was not before the court below and is not before us here, for the reason that under Sections 72 and 73, Code 1930, the court to which a case has been removed by a writ of certiorari is 'Confined to the examination of questions of law arising or appearing on the face of the record and proceedings.' *Federal Credit Co.* v. *Zepernick Grocery Co.*, 153 Miss. 489, 120 So. 173; *Hamilton* v. *Long*, 181 Miss. 627, 180 So. 615.

"Three of the Appellant's remaining complaints necessary to be considered are:

* * * * * * *

"3. Orders of quasi-judicial commissions and bodies must be supported by a finding of basic facts; otherwise they are unconstitutional, null and void, and violate the Due Process Clause of the Constitution of the United States, and Section 14 of the Constitution of Mississippi. * * *"

The Court further held that the Sales Tax statutes of Mississippi did not restrict the Commission to additional assessments from the best information available, notwithstanding the registered notice of December 8, 1939 (Rec. 73-74) emphatically and positively shows that such additional assessments for sales tax for the years 1937 and 1938 were made "from the best information available * * * by reason of the fact that the records kept by you were not adequate to determine the amount of tax for which you were heretofore liable, which said amended and additional assessments are as shown by copies of returns and assessments hereto attached for said respective years. * * *."

On June 23, 1945 Appellant paid the amount of the additional assessment made against him by Appellees for the years 1937 and 1938 and then filed his Declaration in the

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Circuit Court of Harrison County, Mississippi, the county of his residence, as required by *Section 10122 of the Mississippi Code of 1942* to recover said tax and alleged that he was improperly charged with and was required to pay said tax, and that the Sales Tax Statute of Mississippi as construed and applied against him by Appellees and the Courts of Mississippi were unconstitutional and deprived him of his property without due process of law and without the equal protection of the law within the meaning of and contrary to *Section 1 of Article XIV of the Amendments to the Constitution of the United States*, and *Section 14 of the Constitution of Mississippi.*

To Appellant's Declaration Appellees filed a plea of res adjudicata which was sustained and Appellant's Declaration dismissed. (Rec. 31). There was an appeal to the Supreme Court of the State of Mississippi which Court reversed and remanded the case to said Circuit Court for further proceedings not inconsistent with the opinion of said Supreme Court. (R. 138-151). Upon remand Appellees filed an amended plea of res adjudicata, to which Appellant made replication (Rec. 81-89) and the Circuit Court of Harrison County sustained the amended plea of res adjudicata and again dismissed Appellant's declaration. Appellant's motion (Rec. 133-136) to open and vacate the judgment of the Circuit Court of Harrison County was overruled. To the offer of introduction of evidence by Appellees, Appellant made objection in writing (Rec. 127-129), attacked the jurisdiction of Appellees, and claimed and showed that the orders and judgments against him were not made and rendered by a Court of competent jurisdiction on the merits of the cause; and because the opinions of the Supreme Court of Mississippi in Cause No. 36301, rendered February 24, 1947, and March 24, 1947, constitute and are the law of this case; and, further, because nothing was before the trial court other than the

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pleadings, including certified copies of the orders and judgments exhibited with defendant's pleas, and the opinion of the Supreme Court of Mississippi, reported in 193 Miss. 286, 5 So. 2d. 487; and, further because the offered evidence was insufficient to form a sufficient basis to sustain the application of the doctrine of res adjudicata; that the doctrine of res adjudicata cannot be predicated upon administrative action; and, because the statute under which this suit was filed, being *Section 10122 of the Mississippi Code of 1942,* makes the order of the Tax Commission not finally conclusive, and does not require protest against payment or demand for refund, but the aggrieved taxpayer may file an action to recover the taxes for which he was improperly charged; and because said judgment rendered by a court upon the review of a decision made by an administrative body unless said judgment was a final judgment rendered by a court of competent jurisdiction on the merits; and because the judgment of the Circuit Court of Hinds County, exhibited with defendants pleas, and which judgment was affirmed by the Supreme Court of Mississippi, was not a final judgment rendered by a court of competent jurisdiction on the merits; and because the judgment in the former action was rendered because of a misconception of the remedy available to plaintiff and because of the form of procedure; and because the pleas of defendants filed herein do not recite the issues raised in the former proceedings, and do not show that the merits of plaintiff's cause was adjudicated and finally determined, because said orders and judgments were rendered without evidence, without a hearing provided by statute, being *Section 6, Chapter 113, of the Laws of 1938 of Mississippi,* as amended, relied upon by defendants, and set forth in their pleas filed herein, is unconstitutional, null and void, and attempts to rest power in the defendants to make such order in this type of cause as might appear to defendants just and lawful;

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and because the actions and proceedings mentioned by defendants in their plea and amended plea of res adjudicata filed herein, and the statutes and applicable provisions of the Sales Tax Statute of the State of Mississippi mentioned in Plaintiff's replication filed herein, as construed and applied against the Plaintiff by Defendants, is unconstitutional, null and void and violates the *Fourteenth Amendment of the Constitution of the United States* and *Section Fourteen of the Constitution of the State of Mississippi;* and for other grounds manifest on the face of the record.

The Supreme Court of the State of Mississippi reversed the Circuit Court of Harrison County, sustaining the amended pleas of *res adjudicata.* 33 So. 2d 310, not yet reported in State reports.

The Court stated in its opinion:

"The instant case presents a record which contains a complete history of this litigation, and all orders and judgments were made exhibits to the plea of res adjudicata. From a judgment of the trial court sustaining the plea this appeal is presented.

"When the foregoing chronicle of litigation is seen in connection with unsuccessful appeals to the Supreme Court of the United States an impression may readily be gained that a contention that Appellant had his day in Court may appear as an understatement. Yet the fact that Appellant had unsuccessfully tried to escape liability by several locked doors, need not of itself deny him egress by the only available avenue. Code 1942, Section 10122, furnished the only means whereby liability may be adjudged upon the merits by a court of competent jurisdiction. That he has drawn heavily upon patience and persistence in seeking appropriate remedy may be credited to his industry without being charged against his substantive rights."

Viator v. *Stone, supra.*

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However, the Supreme Court of Mississippi in *Viator* v. *Stone,* No. 36,614 reported in 37 So. 2d 1, on October 11, 1948, sustained the suggestion of error filed by Appellees and affirmed the action of the Circuit Court of Harrison County, Mississippi in sustaining the amended plea of *res adjudicata,* and dismissing Appellant's suit, and hence affirmed the judgment of the Circuit Court of Harrison County.

The Court stated in its opinion:

"The question now before us on this suggestion of error • • • is whether or not the said Section 10122 has any application to the suit that is now sought to be maintained by the taxpayer in the Circuit Court of the county of his residence."

Again, in *Viator* v. *Stone,* No. 36,642, 33 So. 2d 310, the Court said:

"The subsequent litigation was the first opportunity for the taxpayer to adjudicate the merits of his liability before a court of competent jurisdiction. Upon the first appeal the cause was reversed because the plea did not fully set forth the sources by which this test was to be applied. Upon remand a complete record was made and we are compelled to hold that the plea as amended fails to reveal a prior judgment between the same parties involving the merits of the controversy. *Viator v. Stone, supra.* The objection to the plea ought to have been sustained. Reversed and remanded."

The judgment of the Supreme Court of Mississippi, appealed from denies Appellant the right to a judicial, as contra-distinguished from an administrative hearing, and permits the taking of the property of appellant without evidence, contrary to the indisputable character of the evidence offered by Appellant, and without a finding of basic

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fact, supported by evidence, and has resulted in the exercise of arbitrary power by Appellees and denies Appellant due process of law and equal protection of law within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States and Section 14 of the Constitution of Mississippi.

The Supreme Court of the State of Mississippi decided the claim of constitutional right to a fair hearing, based upon evidence, with the right of Appellant to submit evidence to overcome the case against him, and a report in writing setting forth a review of the cause and the essential facts of the matter, against Appellant, and the decision of the State Court could not have been made without deciding such constitutional question.

E

Substantiality of Questions Involved

The Appellant respectfully represents that the questions involved in his appeal to the Supreme Court of the United States are of a substantial nature. It is well established that an appeal will not be dismissed for want of a substantial Federal question, unless the contentions of the Appellant are "clearly not debatable and utterly lacking in merit." *Hamilton* v. *Regents of Univ. of Calif.*, 293 U. S. 245; *Roe* v. *Kansas*, 278 U. S. 191, 49 S. Ct. 160, 73 L. Ed. 259; *American Sugar Ref. Co.* v. *Louisiana* (1900), 179 U. S. 89, 21 S. Ct. 43, 45 L. Ed. 102; *Milheim* v. *Moffat Tunnel Dist.* (1923), 262 U. S. 710, 43 S. Ct. 694, 67 L. Ed. 1194; *Senn* v. *Tile Layers Protective Union* (1937), 301 U. S. 468, 57 S. Ct. 857, 81 L. Ed. 1229.

The issue raised by the Appellant's contention that the Mississippi Statutes here in question violate the due process and equal protection of the law clauses of Section 1 of the XIV Amendment to the Constitution of the United

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States and Section 14 of the Constitution of Mississippi involve the problem of taking property of Appellant without due process of law, and the State statutes, as construed and applied against Appellant permitted arbitrary action by Appellees, the making of additional Sales Tax Assessments without evidence, contrary to the indisputable character of evidence offered by Appellant, without the opportunity being afforded Appellant to know the nature of the case against him and the evidence to support it, and without a finding of basic fact supported by such evidence. *Section 6 of Chapter 113 of the Laws of Mississippi of 1938* required Appellant to maintain adequate records and preserve invoices for a period of two years. If he failed therein, Appellee Chairman was authorized to make additional assessment from the "best information obtainable", and give notice by registered mail of such returns and assessments, and such returns and assessments then became prima facie correct. The proviso contained in Section 6 permits the taxpayer to petition for a hearing and required the Chairman to grant such hearing and investigate the matter fully before proceeding further. After such hearing by the Chairman, taxpayer is granted a further hearing on appeal before the entire Commission, and the Excise Commissioner shall hear such appeal, examine books and records, subpoena witnesses, and at the conclusion of such hearing on appeal make a report in writing setting forth a review of the cause and the essential facts of the matter.

Appellees failed and refused to grant such hearing, investigate the matter fully, produce evidence, subpoena witnesses, and make a report in writing setting forth a review of the cause and the essential facts of the matter. The Statutes as thus construed and applied by them against Appellant, and by the Supreme Court of Mississippi against Appellant, deprived Appellant of due process of law and the equal protection of the law, permitted the exercise of

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arbitrary power, and the exaction and collection of additional sales tax from Appellant without affording him his constitutional right to be heard, to have his day in court, and his property to be taken from him without any semblance of showing of liability for such additional taxes. And the State Court, by its judgment of October 11, 1948, attempts to preclude Appellant from having a hearing on the merits of his cause, and thus would dispose of Appellant's claim of constitutional right, by deciding and holding that its judgment is binding upon Appellant because of its finality, whether correct or not on the issue of liability involved.

This appeal presents questions the determination of which is important not alone to appellant, but to all taxpayers in the State of Mississippi. The Sales Tax Laws of Mississippi affect every person in the State of Mississippi, and because the Mississippi Supreme Court has, for the ten years, been unable to point the way to such taxpayers, and the Legislature of Mississippi has not seen fit to amend the Sales Tax Laws of Mississippi to definitely prescribe the remedy in such type of case, each and every taxpayer of the State will be in doubt whether administrative appeals from decisions of the Chairman of the State Tax Commission to the entire Commission, to be heard by the Excise Commissioner, and then by the Courts, will ever afford them a proper remedy. A decision by the Supreme Court of the United States in this case will not only remove this grave uncertainty, by deciding to what extent the Sales Tax Statutes of Mississippi afford due process of law and the equal protection of the law, as construed and applied by appellees against appellant herein, but will also secure to appellant and the citizenry of the State of Mississippi their constitutional right in all of such matters as additional assessments for Sales Tax "from the best information available" by reason of the fact, if it is a fact and shown to be a fact, that taxpayers fail to maintain adequate records and

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preserve invoices for two years as required by Section 6, of Chapter 113, of the Laws of 1938; and, further, when and in what cases the Excise Commissioner named in Section 1, of Chapter 150, of the Laws of 1938, is required to make a report in writing setting forth a review of the cause and the essential facts of the matter, and the nature and sufficiency of such report, as will constitute due process of law.

In a leading article in the Mississippi Law Journal, of May, 1948, Volume XIX, Number 3, at page 341, the writer said:

"The sixth appearance of this (Viator *v.* Stone, et al.) case in the Mississippi Supreme Court will probably occur when the case has been tried on the merits."

The writer no doubt had reference to the hearing on the merits, mentioned by the Supreme Court of Mississippi in *Viator* v. *Stone,* 33 So. 2d 310. No member of the Bar of Mississippi could foresee then that the State Supreme Court would hold that any right growing out of such additional assessments that the taxpayer may have had under *Section 10122 of the Mississippi Code of 1942,* to sue the Commission was merged into the judgment rendered by the Circuit Court of Hinds County on certiorari and the judgments of affirmance thereof by the Supreme Court of Mississippi; and that the Supreme Court of Mississippi would further hold and decide that the judgment then rendered by that Court would be binding upon the Appellant-taxpayer because of its finality, whether correct or not on the issue of liability involved, and the Supreme Court of Mississippi, in its opinion sustaining the Suggestion of Appellees, reported in 37 So. 2d, say:

> "• • • that the said judgment existed as a valid asset belonging to the State until fully paid and satisfied; and that this Court has had no power to disturb or recall the same at any time since we overruled the

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suggestion of error in the case and our action in so doing was affirmed by the Supreme Court of the United States."

F

Cases Sustaining the Jurisdiction

The following cases sustain the jurisdiction of the Supreme Court of the United States:

1. Jurisdiction to entertain an appeal from the decision of a State court sustaining the constitutionality of Orders of administrative bodies under Statutes of the State where it is contended that such State statutes as construed and applied by such Administrative bodies are unconstitutional, and violate the Constitution of the United States. *Northern Pacific Ry. Co.* v. *Department of Public Works of Washington,* 268 U. S. 39, 69 L. Ed. 836, 45 S. Ct. 412; *Ohio Bell Tel. Co.* v. *Public Utilities Comm. of Ohio,* 301 U. S. 292, 57 S. Ct. 724; *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287, 64 L. Ed. 908, 40 S. Ct. 527.

2. Jurisdiction to entertain an appeal from the decision of a State court in a suit for the recovery of a tax on the ground that it was exacted in violation of the Constitution of the United States. *Henrietta Mills* v. *Rutherford County, North Carolina,* 281 U. S. 121, 50 S. Ct. 270, 74 L. Ed. 737; *Arkansas Building & Loan Association* v. *Madden,* 175 U. S. 269, 20 S. Ct. 119, 44 L. Ed. 159; *Atchison, Topeka & Santa Fe Ry.* v. *O'Connor,* 223 U. S. 280, 32 S. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, p. 1050; *Shelton* v. *Platt,* 139 U. S. 591, 11 S. Ct. 646, 85 L. Ed. 273; *Matthews* v. *Rodgers,* 284 U. S. 521, 52 S. Ct. 217, 76 L. Ed. 447; *Connecticut General Life Ins. Co.* v. *Johnson, Treasurer of State of Calif.,* 303 U. S. 77, 58 S. Ct. 436.

3. Jurisdiction to entertain an appeal from the decision of a State court in a suit involving the validity of a statute

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of any state, on the ground of its being repugnant to the Constitution of the United States, treaties or laws of the United States and such decision is in favor of its validity. *Connecticut General Life Ins. Co.* v. *Johnson,* 303 U. S. 77, 58 S. Ct. 436; *American Sugar Ref. Co.* v. *State of Louisiana,* 179 U. S. 89, 21 S. Ct. 43, 45 L. Ed. 102; *Southern Pacific Co.* v. *Schuyler,* 227 U. S. 601, 57 L. Ed. 662, 33 S. Ct. 277; *Norfolk, etc. R. Co.* v. *Conley,* 236 U. S. 605, 35 S. Ct. 437, 59 L. Ed. 745; *Fiske* v. *State of Kansas,* 274 U. S. 380, 71 L. Ed. 1108, 47 S. Ct. 665; *Southern Ry. Co.* v. *Virginia,* 290 U. S. 39, 69 L. Ed. 836, 45 S. Ct. 412; *Bi-Metallic Co.* v. *Colorado,* 239 U. S. 441, 36 S. Ct. 141; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minnesota,* 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462; *Hoeper* v. *Tax Commission of Wisconsin,* 284 U. S. 206, 52 S. Ct. 120; *Lawrence* v. *State Tax Commission of Mississippi,* 286 U. S. 276, 52 S. Ct. 556; *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 35 S. Ct. 625; *Turner et al.* v. *Wade, Sheriff of Brooks County, Georgia,* 254 U. S. 64, 41 S. Ct. 27.

4. Jurisdiction to entertain an appeal from the decision of a State court in a suit involving the validity of a statute of any State, on the ground that as construed and applied by the State Court to a particular transaction the statute is repugnant to the Constitution, treaties or laws of the United States, and such decision is in favor of its validity. *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239; *Cudahy Co.* v. *Parramore,* 263 U. S. 418, 422, 44 S. Ct. 153, 68 L. Ed. 366; *Snyder* v. *Massachusetts,* 291 U. S. 97, 115, 54 S. Ct. 330, 78 L. Ed. 674; *Nashville, C. & St. L. R. Co.* v. *Walters,* 294 U. S. 405, 415, 55 S. Ct. 486, 79 L. Ed. 949; *Doty* v. *Love,* 295 U. S. 64, 67, 55 S. Ct. 558, 79 L. Ed. 1303.

5. Jurisdiction to entertain an appeal from the decision of a State Court on the ground that a State statute is repug-

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nant to the "Due Process" clause of the Fourteenth Amendment to the Constitution of the United States. *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U. S. 77, 58 S. Ct. 436.

Therefore the appellant, Eddie J. Viator, respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 344 (a) of Title 28 of the United States Code.

Respectfully submitted,

ALBERT SIDNEY JOHNSTON, JR.,
WEAVER E. GORE,
Counsel for Appellant.

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APPENDIX "A"

IN THE SUPREME COURT OF MISSISSIPPI

No. 34,664

EDDIE J. VIATOR

vs.

STATE TAX COMMISSION, et al.

In Banc

Per CURIAM:

One of the appellant's contentions is that "Orders of quasi-judicial commissions and bodies must be supported by a finding of basic facts; otherwise they are unconstitutional, null and void, and violate the Due Process Clause of the Constitution of the United States, and Sec. 14 of the Constitution of Mississippi."

The Court desires briefs addressed and confined to the question thus raised. The briefs should discuss the following questions:

1. Is the State Tax Commission a quasi-judicial commission or a mere administrative agency?

2. What "finding of basic facts" should, but does not, appear in the order of the State Tax Commission here in question?

3. What provision of the Constitution, or of a statute, or rule of the common law requires such a finding to appear in the order of the Commission?

4. Does the fact that the order here in question is one assessing property differentiate it, in so far as the question here under consideration is concerned, from other orders of an administrative agency?

5. May the recitals in the last notice, the notice being framed by the Commissioner himself, be considered as a part of the order, and as sufficient to supply recitals which,

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according to appellant's apparent contention, ought to have been a part of the order itself?

No other questions should be discussed in these briefs.

The brief of counsel for the appellant to be filed on or before October 10, 1941; the reply thereto by counsel for the appellee to be filed within one week after the filing of the brief for counsel by the appellant; the rejoinder of counsel for the appellant to be filed within five days after the filing of the brief of counsel for the appellee. These dates may be changed by written agreement of counsel filed with the clerk of this Court; copies to be served in accordance with the rules of this Court.

APPENDIX "B"

IN THE SUPREME COURT OF MISSISSIPPI

No. 34664

(Opinion Rendered January 12, 1942)

EDDIE J. VIATOR

vs.

STATE TAX COMMISSION, et al.

IN BANC:

Smith, Chief Justice

This is an appeal from a judgment affirming an order of the State Tax Commission approving two additional sales tax assessments against the appellant. The assessments were made by the Chairman of the State Tax Commission under the provisions of Sections 5 and 6, Chapter 113, Laws of 1938, and were approved by the State Tax Commission on an appeal to it.

1. Section 8 of that statute provides that "No injunction shall be awarded by any court or judge to restrain the col-

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lection of the taxes imposed by this act, or to restrain the enforcement of this act." The appellant says that this provision of the statute violates Section 159 of the State's Constitution, which prescribes the jurisdiction of the chancery court. This may or may not be true, but we are not called on to determine it for the reason that if this section of the statute does run counter to the Constitution, that fact would have no effect on the remainder of it, which would remain in full force and effect.

2. Another of the appellant's complaints is that "there is no presumption in favor of the validity of an order unless there is evidence to support such order." The order referred to is that made by the Tax Commission approving this assessment. Whether this order of the State Tax Commission is supported by evidence was not before the court below and is not before us here, for the reason that under Sections 72 and 73, Code 1930, the court to which a case has been removed by a writ of certiorari is "confirmed to the examination of questions of law arising or appearing on the face of the record and proceedings." Federal Credit Co. *v.* Zepernick Grocery Co., 153 Miss. 489, 120 So. 173; Hamilton *v.* Long, 181 Miss. 627, 180 So. 615.

Three of the appellant's remaining complaints necessary to be considered are:

1. State Tax Commission has only such jurisdiction as conferred by statute. In the case of additional assessments for sales tax, such can be made only for failure to keep adequate records and preserve invoices for a period of two years. Unless jurisdictional facts appear of record, the State Tax Commission has no jurisdiction to make an additional assessment for sales tax.

2. The claim that taxpayer kept records and preserved invoices for a period of two years, is a denial of an essential jurisdictional fact, and before the State Tax Commission could proceed under the law, jurisdiction to make the additional assessment must be proven by appellees, and must affirmatively appear of record.

3. Orders of quasi-judicial commissions and bodies must be supported by a finding of basic facts; otherwise they

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are unconstitutional, null and void, and violate the Due Process Clause of the Constitution of the United States, and Sec. 14 of the Constitution of Mississippi.

These three complaints will be considered together.

Under Sections 4, 5, and 6, Chap. 113, Laws of 1938, it is the duty of a person liable to the tax imposed on sales of property to make a return to the chairman of the State Tax Commission, on prescribed forms, of all cash and credit sales made by him. When this is done, the chairman of the Commission, designated in the statute, and will hereinafter so be, as the Commissioner, is charged with the duty of examining into its correctness. In so doing, he may examine the books and other records of the taxpayer, if any (Sec. 6), and (Sec. 12) "any books, papers, record, or other data bearing upon the correctness of any return * * * including the records of any common carrier, bank, wholesale, or retail dealer in any kind of merchandise, doing business in this State * * * and may require the attendance of any person and take his testimony with respect to any such matter, with power to administer oaths to such person or persons." If (Sec. 6) adequate records of his sales are not kept by the taxpayer, the Commissioner may determine the correctness of the taxpayer's return thereof "from the best information available." If the Commissioner finds that the taxpayer's return of the amount of his sales is less than it should be, it becomes his duty to make an additional return or assessment of the amount of the taxpayer's sales. When this is done, he must give the taxpayer written notice thereof by registered mail, and if the taxpayer makes no objection thereto, the return or assessment becomes final. If, however, the taxpayer so requests, he shall be given a hearing on the assessment by the Commissioner, and, if dissatisfied with the result thereof, he may appeal (Sec. 8) therefrom to the State Tax Commission which, after a full hearing and consideration of the evidence introduced by the taxpayer, must either approve, disapprove, or modify the assessment. This procedure was here followed.

Two additional returns or assessments were here made by the Commissioner on blank forms prescribed for that

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purpose, the statute not requiring such to be entered on an assessment roll. One of these returns, after setting forth the taxpayer's name and address, recites: "An examination of your records made in accordance with sections 7, 8, and 18 of the Sales Tax Law of 1932 (Chapter 90) as reenacted and amended, for the period from January 1, to December 31, 1938 indicates an additional tax due thereon in the amount of $1,606.64, arrived at as follows." It then sets forth the amount of sales theretofore reported by the taxpayer and the amount thereof found by the Commissioner, in addition to that returned by the taxpayer, with this notation, "prima facie assessment, same having been made from the best information available." It then sets forth the amount of taxes due on the sales by the taxpayer. The notice by registered mail to the appellant of this additional return is, in part, as follows: "You are hereby given notice, by registered mail, of the hereinafter assessments made against you from the best information available in addition to the previous returns and payment of sales tax heretofore made by you for the periods January 1, 1937, to December 31, 1937 and January 1, 1938, to December 31, 1938, by reason of the fact that the records kept by you were not adequate to determine the amount of tax for which you were heretofore liable, which said amended and additional assessments are as shown by copies of returns and assessments hereto attached for the said respective years." The other assessment was for the year 1939, and it and the notice were similar to the above. The order of the Tax Commission simply approved the assessments and stated the amount of the tax due thereon.

3. The right and duty of the Commissioner to make an additional return or assessment of the taxpayer's sales in addition to that returned by him is not dependent on the failure of the taxpayer to keep adequate records, and the only effect of the provision as to inadequate records in Section 6 of the statute is to permit the Commissioner, when the taxpayer's records are inadequate, to determine the correctness of the return made by him "from the best information available."

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4-8. The Chairman of the State Tax Commission possesses only such powers as are conferred on him by statute expressly or by implication, and he can make an additional sales tax assessment in only such cases as the statute permits. He possesses in this repect a special and limited and not a general jurisdiction. A tribunal or officer excercising a special and limited jurisdiction can act only when the facts exist which invest him with authority to act, and these facts, in their ultimate and essential aspects, here the additional assessment and the grounds for making it, must be disclosed by the order made thereon. The assessment here made by the Chairman of the State Tax Commission sufficiently complies with these requirements, it became thereby prima facie correct, and the taxpayer was given an opportunity both by the Chairman of the Commission and by the Tax Commission itself to negative by evidence the facts on which the assessment was based. The order of the State Tax Commission being simply one approving the assessment made by its Chairman, it was not necessary for it to again set forth the facts on which the assessment was made.

Affirmed.

APPENDIX "C"

IN THE SUPREME COURT OF MISSISSIPPI,
DIVISION B

No. 35405

(Opinion Rendered June 7, 1943)

EDDIE J. VIATOR, et al.

v.

EDWINS, SHERIFF, et al.

Alexander, Justice

1, 2. Appellant filed his bill for injunction against appellee, who, as sheriff, was proceeding to enforce by execution the judgment affirmed by this court in Viator *v.* State Tax Commission, Miss., 5 So. 2d 487, 489. The Chan-

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cellor set a day for a hearing upon application for temporary injunction. The appellee, however, attached the bill by demurrer which set up that the bill itself which in meticulous detail disclosed all the steps and proceedings precedent to the final judgment in the above case, and further interposed the defense that such case conclusively settled the law of the present proceeding. The chancellor sustained the demurrer and dismissed the bill. It is hardly necessary to add that the demurrer did not admit the allegations of the bill as to the irregularity of the former proceeding and as to the invalidity of the judgment, which are mere conclusions of law.

Appellant's contentions are pressed with painstaking industry and earnestness, and we have examined the entire record carefully. It would not be helpful to rehearse the history of this litigation. Appellant discloses in his bill that he has availed of and exhausted every administrative and legal remedy, and we find it necessary only to quote from the opinion in the former case, which must be met to make such powers effective, stated: "The assessment here made by the Chairman of the State Tax Commission sufficiently complies with these requirements, it became thereby prima facie correct, and the taxpayer was given an opportunity both by the Chairman of the Commission and by the Tax Commission itself to negative by evidence the facts on which the assessment was based."

The instant proceeding therefore constitutes an attempt to show what might have been shown in the former cause. The contentions here made are identical and represent a continued attack upon the authority of the State Tax Commission and the validity of the former judgment.

3. Nor does Code 1930, Section 420, justify this injunctive proceeding, regardless of conditions precedent to the exercise of this right under this section (as to which see Stone *v.* Kerr, Miss., 10 So. 2d 845), the taxes against the collection of which the injunction was sought are, in view of our former decision, not "attempted to be collected without authority of law."

Affirmed.

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APPENDIX "D"

IN THE SUPREME COURT OF MISSISSIPPI

No. 36,301

(Opinion Rendered February 24, 1947)

EDDIE J. VIATOR

vs.

A. H. STONE, et al.

IN BANC:

Smith, L. A., Sr., J.

This judicial controversy originated when, allegedly, "on the 23rd day of June 1945 the plaintiff was improperly charged with and required to pay additional sales tax for the years 1937 and 1938" (quoting from the declaration), by the State Tax Commission. Appellant paid the amount assessed, and thereafter filed in the Circuit Court of Harrison County, wherein he resided, this action to recover the amount so paid. The action was based on the authority of Section 8, Chapter 113, Laws of 1938, Section 10122, Code 1942, providing that "Any person improperly charged with any tax and required to pay the same, may recover the amount paid, together with interest, in any proper action or suit against the Commissioner, and the circuit court of the county in which the taxpayer resides or is located shall have original jurisdiction of any action to recover any tax improperly collected. It shall not be necessary for the taxpayer to protest against the payment of the tax or to make any demand to have the same refunded in order to maintain such suit."

Appellee pleaded res judicata, in defense of the action, exhibiting with the plea, the original order of the State Tax Commission; the final judgment of the Circuit Court of Hinds County; the judgment of this Court affirming the Hinds County Circuit Court judgment; the per curiam of

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the Supreme Court of the United States dismissing the appeal there from this Court, and denying certiorari, for want of jurisdiction; the decree of this Court affirming that of the Chancery Court of Hinds County; and the per curiam of the Supreme Court of the United States dismissing the appeal from this Court, and denying certiorari, because the decree of this Court was based upon a non-Federal ground.

It will be noted, therefore, that this matter has been twice before us. Viator *v.* State Tax Commission, 193 Miss. 266, 5 So. 2d 487; Viator *v.* Edwins, Sheriff, et al., 195 Miss. 220, 14 So. (2d) 212. And twice before the Supreme Court of the United States, Viator *v.* State Tax Commission, 316 U. S., 644, 86 L. Ed. 1728; and Viator *v.* Edwins, Sheriff, et al., 321 U. S. 744, 88 L. Ed. 1047.

The appellant filed a replication, contesting the defense of res judicata. On the pleadings the Circuit Court of Harrison County entered a judgment for appellee. Nothing was before the trial court other than the pleadings, including the certified copies of the orders and judgments, supra, exhibited with appellee's plea of res judicata, and the opinion of this Court, unaccompanied by its record, in 5 So. (2d) 487, 193 Miss. 266. The judgment of the trial court, from which appeal brought the case here again, recited: "This cause coming on to be heard on this day of a regular term of the Circuit Court on the declaration of the plaintiff, the plea of res judicata and exhibits thereto filed by the defendants, and the replication of the plaintiff to said plea, and the court having heard and considered the same, and argument of counsel thereon, is of the opinion that the said plea of res judicata is well taken and should be sustained."

We are of the opinion that in so holding, on what was before the court and forming the foundation of its judgment, the trial court was in error. Such matter was inadequate to form a sufficient basis to sustain the application of the doctrine of res judicata. The doctrine extends to the judgments of all courts, 30 Am. Jur., Sec. 163, Judgments, p. 909, but is not to be predicated upon administrative action, ibidem, Sec. 164, p. 909. The statute, Section 10122, Code 1942, makes the order of the Tax Commission not

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finally conclusive, and does not require protest against payment, or demand for refund, before the aggrieved taxpayer may file an action to recover a tax with which he was improperly charged.

This statute prevents the application, on the issue of res judicata, of the part of Section 164, same topic, 30 Am. Jur., Judgments, p. 909, announcing that "it is clear that the doctrine of res judicata applies to a judgment rendered by a court of competent jurisdiction on the merits. Only such a judgment can operate as a conclusive determination of a cause of action. Section 172, 30 Am. Jur. 914; Coffman *v.* Brown, 7 S & M (15 Miss.) 125, 45 Am. Dec. 299; Sec. 201, 30 Am. Jur. 940; Johnson *v.* Walker, 86 Miss. 757, 39 So. 49, 1 L. R. A. (NS) 470, 109 Am. St. Rep. 733; Mosby *v.* Wall, 23 Miss. 81, 55 Am. Dec. 71.

Parties are precluded from relitigating the same facts, regardless of the form of action. Sec. 178, 30 Am. Jur. 920; Fair, et al. *v.* Dickerson, 164 Miss. 432, 144 So. 238; Agnew *v.* McElroay, 10 S & M (18 Miss.) 552, 48 Am. Dec. 772. The mere fact that the relief sought is the same in the two actions does not necessarily make the causes of action identical within the meaning of the doctrine of res judicata. Sec. 176, p. 919, ibidem; nor does the fact that a person invokes the jurisdiction of a court preclude him from questioning its jurisdiction of the subject matter when its judgment is asserted as res judicata. Sec. 201, p. 940, ibidem. The doctrine is not a bar to a subsequent action, if the judgment in the former action was rendered because of a misconception of the remedy available or of the proper form of proceeding. Sec. 210, ibidem. Murphy *v.* Hutchinson, 93 Miss. 643, 48 So. 178; 21 L. R. A. (NS) 785, 17 Am. Cas. 611. All of which brings us down to the sole test here and that is, was there enough before the trial court from which it could derive authority to sustain the plea of res judicata, as such doctrine was announced, supra, and in Browne *v.* Merchants Company, 186 Miss. 431, 191 So. 120? In other words, were the judgments exhibited alone sufficient to prove that the merits of the case had been adjudicated in a court of competent jurisdiction? Unless that were done, it would be beside the point, to con-

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sider the number of courts and forms of action the litigation has involved. The determination of that question, furthermore, does not require overruling, in whole or in part, the cases in which the exhibited judgments were rendered, and nothing we say here is to be construed as overruling the prior decisions of this Court in the former litigations between these parties.

It is generally held that the existence and contents of a judgment, sought to be made available as a basis for the application of the doctrine of res judicata, must be proved by offering the record, or a copy thereof, in evidence, Sec. 273, 30 Am. Jur. p. 993. One reason for the rule is that the judgments of trial courts are subject to review, and that in order to review them, a record of the proceedings must be made, for the appellate court, which cannot take judicial notice of the records. Divide Creek Irrigation District *v.* Hollingsworth, C. C. A. 10th, 72 Fed. (2d) 859, 96 A. L. R. 937. In Bridgeman, et al. *v.* Bridgeman, 192 Miss. 800, 6 So. (2d) 608, we held that a court cannot, in determination of a particular case, take judicial notice of what was done in any other case, even in the same court, so as thereby to supply facts essential to the support of the particular case out of those shown in the prior case. In Armstrong *v.* Jones, 198 Miss. 627, 22 So. (2d) 7, involving same court, and same parties, it was held that, generally, an issue whether prior cases between parties involved same issues as present case should be determined on pleadings and proof, and that court could not have recourse to judicial notice in such situation, so as thereby to supply facts essential to the support of the particular case out of those shown in the prior case.

This does not mean that in considering previous decisions of this court, the facts therein set forth may not be compared or contrasted with the facts of a case later being tried, to determine whether there is enough analogy to constitute precedent or stare decisis, law of the case, relevancy, and so on. Such procedure has no similarity to a resort to the record of facts in a previous case, in order to supply out of them, necessary facts absent

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from the record of the case, where it is sought to apply the doctrine of res judicata.

Furthermore, we have said that where the record of a decree of a court of competent jurisdiction is offered in evidence, every presumption is to be indulged as to the correctness of the facts on which it is founded, and which appear of record. Hardy *v.* Gholson, 26 Miss. (4 Cush.) 70. And where a decree is relied on as evidence, the proceedings upon which it is predicated must accompany it. Goddard *v.* Long, 5 S. & M. (13 Miss.) 782. Compare, also, True-Hixon Lbr. Co. *v.* Thorne, 171 Miss. 783, 158 So. 909. We have also held that, under some circumstances and conditions, it is proper to show by parol that a former suit, pleaded in bar, was not decided on the merits, Robinson *v.* Lane, 14 S. & M. (22 Miss.) 161.

Under the above authorities we have concluded that we cannot determine from the mere pleadings, exhibited copies of the judgments, and our opinion, supra, whether or not the merits of the controversy between the parties here were, or could have been, properly litigated in the other trials, appealed to this court from the circuit and chancery courts of Hinds County, respectively, supra. And whether or not there was present, at the time, competent jurisdiction to try the cases on the merits of the controversy, or, if so, whether or not this controversy was actually tried on the merits. See Stone, Chairman of the State Tax Commission, *v.* Kerr, 194 Miss. 646, 10 So. (2d) 845. We cannot borrow from the records of those cases the necessary evidence absent from the record here, either by resort to such records for use as evidence in the instant case, or by judicial notice thereof.

This situation is not benefited, in our judgment, by a stipulation in the record agreeing that the opinion of this Court in 5 So. (2d) 487-9 be considered by the Court on the hearing of this cause as evidence on behalf of the plaintiff below, appellant here. The appellee did not offer the opinion in evidence. It was offered by the appellant, and recourse to that opinion, which is also in 193 Miss. 266, reveals this announcement by the Court: "Whether this order of the State Tax Commission is supported by evi-

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dence was not before the court below and is not before us here, for the reason that under Sections 72 and 73, Code 1942, the court to which a case has been removed by a writ of certiorari is 'confined to the examination of questions of law arising or appearing on the face of the record and proceedings.' Federal Credit Co. *v.* Zepernick Grocery Co., 153 Miss. 489, 120 So. 172; Hamilton *v.* Long, 181 Mis. 627, 180 So. 615. The opinion further states that:

"The assessment here made by the Chairman of the State Tax Commission sufficiently complies with these requirements, it became thereby prima facie correct, and the taxpayer was given an opportunity both by the Chairman of the Commission and by the Tax Commission itself to negative by evidence the facts on which the assessment was based. The order of the State Tax Commission being simply one approving the assessment made by its Chairman, it was not necessary for it to again set forth the facts on which the assessment was made." It will thus be seen that we cannot determine from the opinion alone, aside from its record, that the trial had there was one on its merits, as the facts were not before the Court, where the case had been brought by a writ of certiorari. This opinion, furthermore, was simply agreed to be considered as in evidence, was not agreed to be conclusive, and does not comply with the rule defining the record of a judgment.

In addition to the other authorities on the subject set out, supra, it was held by this Court in Dogan, et al *v.* A. R. Brown, Exec., 44 Miss. 235, that a party claiming a benefit under a decree must produce the entire record of the suit; the decree alone is not sufficient as other parties might show that it was vacated, set aside or reversed, besides it is essential to its validity that the jurisdiction of the Court over the parties should appear. It was also held in that case: "Within the scope of the cases cited, the recital of due and legal service made a prima facie case of the notice to the legatees; but not conclusive; for the same cases hold, that other parts of the record may be resorted to, to show what is the actual truth." Compare the "prima facie case" mentioned in the 5 So.

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(2d) 487 opinion of this Court with the "prima facie" mentioned in the case from which we have just quoted. So, we think that the opinion of this Court referred to in the stipulation of this case, as stated, supra, does not reveal enough as it is unaccompanied in the evidence of this case by the record on which it is founded, and is therefore not sufficient to form the basis of the application of the doctrine of res judicata, which requires that a cause be litigated on its merits before it can be used for such a basis.

Section 10122, Code 1942, existing at the time the opinion in 5 So. (2d) 487 was rendered, created a new and special jurisdiction to determine issues arising between a sales taxpayer and the State Tax Commission and hence was the only court having competent jurisdiction to hear appellant's complaint that he was improperly charged, and decide on the merits whether he was entitled to recover the tax paid or not. The act confers on that court "original jurisdiction of any action" to recover any tax improperly collected, with right of appeal to this Court, and hence the Court, which heard only a certiorari issue, could not and did not render a judgment on the merits, which authority the Legislature had confided to the Circuit Court of Harrison County in this case, same being the home of appellant. The opinion in 5 So. (2d) does not disclose that this statute was called to the attention of the Court, but does say, as quoted, supra, "Whether this order of the State Tax Commission is supported by evidence was not before the court below and is not before us here."

Therefore, the judgment of the circuit court is reversed and the cause remanded for further proceedings not inconsistent with these views.

Reversed and remanded.

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APPENDIX "E"

IN THE SUPREME COURT OF MISSISSIPPI

No. 36,301

(Opinion rendered March 24, 1947)

EDDIE J. VIATOR

vs.

A. H. STONE, et al.

IN BANC:

ROBERDS, J.

ON SUGGESTION OF ERROR

Able counsel for appellees have filed a suggestion of error apparently upon the assumption that in our original opinion herein we held that the various prior proceedings pertaining to the subject matter of the present litigation do not and cannot constitute res adjudicata of the questions and issues involved in the case at bar. This is a misconception of the original holding, or, at least, what we intended to hold. We merely decided that the plea of res adjudicata, in the form and substance as filed and presented in this case, did not sufficiently present to the trial judge, and does not sufficiently present to us, the questions and issues involved in such former proceedings, how they were decided upon the merits, and the power and jurisdiction of the tribunals to pass upon them, as that the court can say those prior proceedings are res adjudicata of the questions and rights of the parties in the present litigation and remanded the case. In the original opinion we said "All of which brings us down to the sole test here, and that is, was there enough before the trial court from which it could derive authority to sustain the plea of res adjudicata * * *. In other words, were the judgments exhibited alone sufficient to prove that the merits of the case had been adjudicated in a court of competent jurisdiction? * * *". We will enlarge upon that question. The

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burden to properly plead and prove the defense of res adjudicata is upon the one invoking it. 30 Am. Jur. p. 997, Par. 283.

In the present proceeding, Viator, in seven paragraphs, set out a number of reasons why he did not owe the tax, and as grounds for recovering the amount he had paid. We quote, for purpose of illustration, one paragraph from his declaration:

"2. The two additional sales tax assessments made against him, for the years 1937 and 1938, are null and void; they were made without jurisdiction, without statutory authority, contrary to the reasons given in Registered Demand, without evidence, contrary to the indisputable character of evidence offered by taxpayer, without the hearing provided by statute, without a report in writing setting forth a review of the cause and the essential facts of the matter, without a finding of basic fact, supported by evidence, and by comparison with the business of other retail merchants done in the year 1939, one and two years, respectively, later than the period for which taxpayer was attempted to be assessed, and by making the additional assessments purposeively (sic) high to take care whatever the Field representatives of the Commission might be able to find." Other questions of fact and legal propositions are raised in the declaration. We will apply to this situation the allegations of the plea.

It first exhibits the order of the Commission. That is not sufficient, first, because the written protest apparently filed by the taxpayer, setting out his contention of nonliability, is not exhibited, nor are the grounds thereof set out in the plea; and, second, because the doctrine of res adjudicata is not to be predicated upon administrative action. 30 Am. Jur. p. 909, Sec. 164.

Next the plea invokes the certiorari proceeding in the circuit court of Hinds County. No statement of fact is made in the plea as to the issues involved. It simply exhibits a copy of the judgment of the court, which order says the court had considered the matter and adjudged Viator liable for the tax.

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The plea then sets up the appeal to this Court. It says this Court affirmed the lower court and exhibited a copy of the judgment entered here. The opinion of this Court was admitted by agreement. In that opinion this Court expressly stated that under our practice the court to which a case has been removed by certiorari is confined to an examination of the questions of law arising or appearing on the face of the record. No controversial questions of fact were adjudicated.

The plea then exhibits a copy of the order of the Supreme Court of the United States upon the appeal to that court. That order merely says the appeal was dismissed because no federal questions were involved.

Next the plea refers to an injunction proceeding in the chancery court of Harrison County. There is no statement of the issues there involved.

It says that case was appealed to this Court. It sets up only the order of this Court, which simply finds there was no error in the chancery court.

It states that case was appealed to the Supreme Court of the United States and exhibits the order of that Court, which says the appeal was dismissed because no federal question was involved.

It then makes reference to a proceeding in the Federal District Court, but does not state what issues and questions were involved.

We believe it is obvious that this plea did not show the issues and questions involved in the former proceedings and their adjudication of courts having jurisdiction thereof so as to demonstrate that the issues and questions now presented have been adjudicated, especially in view of the fact that the plaintiff filed a replication thereto, and the only proof introduced was the opinion of this Court in the certiorari proceeding to which reference has been made above.

We deem it unnecessary for us to undertake to prescribe the form of a plea of res adjudicata. It is necessary that it set out as facts and not as conclusions of the pleader, the issues and questions involved in the former proceeding; show that the court had jurisdiction of the parties and the subject matter, and what the judgment of the court was

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upon such issues. Naturally, the most accurate way to do that is to exhibit copies of the pleadings and of the judgment, as well as copy of the service of process on defendant, showing him to be properly in court, unless this be shown by the judgment. However, it is not absolutely necessary that such copies be exhibited. It is said in 9 Enc. of Pleading and Prac., p. 625 b, "In pleading a former decision as an estoppel, the former record should be set out, or made part of the pleadings; or at least so much of it as will enable the court to determine whether the same question has been adjudicated in the former suit. But it is unnecessary to set forth in detail the pleadings in the former suit."

The annotator in 120 A. L. R., at p. 150, makes this observation: "A sufficient pleading setting up an estoppel by a prior adjudication must show that the earlier judgment was rendered upon the merits of the case, * * * citing Miller *v.* Buckley, 85 Miss. 706, 38 So. 99; Germain *v.* Harwell, 108 Miss. 396, 66 So. 396. It is further stated by the same annotator at page 152 of said report: "To this end, the plea must set forth the issues as appearing from the pleadings and judgment in the former suit, at least, in legal effect, and show by setting forth the defense made in the prior action that the merits of the cause were decided. The former judgment, set up as an estoppel, must also have been decided or rendered upon the merits of the case involved in the second suit. * * *."

In 30 Am. Jur. p. 993, Par. 274, it is said: "Ordinarily, questions as to the effect of judgments as res judicata cannot be decided from the judgment alone, but must be determined by the aid of the entire record, and the general rule is that proof of the whole record must be introduced where a party intends to avail himself of a judgment as an adjudication on the subject matter, particularly where it is material to show the premises and grounds on which the judgment is based, or the jurisdiction of the court rendering the judgment. * * *"

For what is meant by record see Dogan *v.* Brown, 44 Miss. 235. We conclude the discussion by saying that the plea must show, as facts and not conclusions of the pleader, the questions and issues presented to and their adjudica-

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tion by the prior tribunal, and the jurisdiction of that court of the parties and the subject matter, in such full and accurate manner as that the trial court can determine whether the issues and parties in the present litigation are the same as in the prior litigation and that such issues were previously adjudicated on the merits.

Suggestion of error overruled.

APPENDIX "F"

IN THE SUPREME COURT OF MISSISSIPPI

No. 36642

EDDIE J. VIATOR

v.

STONE, CHAIRMAN, et al.

(Opinion Rendered January 12, 1948)

IN BANC

ALEXANDER, *Justice:*

Appellant paid under protest a sales tax for the years 1937 and 1938 in the amount demanded by the State Tax Commission and sues to recover same as having been collected without legal authority. Our law reports disclose the following history on the litigation.

The Chairman of the State Tax Commission, proceeding under Sections 5 and 6, Chapter 113, Laws of 1938, made assessment of Viator for sales tax liability. Upon appeal to the Commission itself the assessment was allowed to stand. Appeal was taken to the Circuit Court of Hinds County by certiorari, whereupon the order of the Commission was affirmed. This Court upon appeal affirmed the latter judgment. Viator *v.* State Tax Commission, 193 Miss. 266, 5 So. 2d 487.

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The commission thereupon had execution issued to collect the tax and same was placed in the hands of Sheriff of Harrison County. Appellant sought injunction against the Sheriff. Demurrer to the bill was sustained upon the ground that the order of the Commission was authorized and valid and that the taxpayer had had full opportunity to be heard before that body. We affirmed. Viator *v.* Edwins, 195 Miss. 220, 14 So. 2d 212.

Appellant then paid the tax and sued to recover. Code 1942, Section 10122. Plea of res adjudicata was interposed and sustained by the trial judge. We reversed upon the ground that, aside from the merits of the case or the sufficiency of a proper plea, the defense was not adequately presented by the incomplete recitals and exhibits, and we were unable to determine whether a former judgment upon the merits had been disclosed. Viator *v.* Stone, Miss., 29 So. 2d 658.

The instant case presents a record which contains a complete history of this litigation, and all orders and judgments were made exhibits to the plea of res adjudicata. From a judgment of the trial court sustaining the pleas this appeal is presented.

When the foregoing chronicle of litigation is seen in connection with unsuccessful appeals to the Supreme Court of the United States an impression may readily be gained that a contention that appellant had his day in court may appear as understatement. Yet the fact that appellant had unsuccessfully tried to escape liability by several locked doors, need not of itself deny him egress by the only available avenue. Code 1942, Section 10122, furnishes the only means whereby liability may be adjudged upon the merits by a court of competent jurisdiction. That he has drawn heavily upon patience and persistence in seeking appropriate remedy may be credited to his industry without being charged against his substantive rights. Viator *v.* Stone, supra.

1, 2. The basis of the plea of res adjudicata is a former hearing and judgment involving the merits. The only opportunity thus far vouchsafed appellant was the hearing before the State Tax Commission. Yet the plea may not

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rest upon mere administrative action. Viator *v.* Stone, supra. Regardless of the difficulties which beset the Commission in making its assessment and the opportunity of the taxpayer to be there heard, these complex proceedings culminated in an order of an administrative body.

The proceeding by certiorari was not such hearing upon the merits. We said in Viator *v.* State Tax Commission (193 Miss. 266, 5 So. 2d 488), supra, "Whether this order of the State Tax Commission is supported by evidence was not before the court below and is not before us here, for the reason that under Sections 72 and 73, Code 1930, the court to which a case has been removed by a writ of certiorari is 'confined to the examination of questions of law arising or appearing on the face of the record and proceedings.' "

Nor was the injunction suit against execution of the Commission's order, which was dismissed upon demurrer, a hearing upon the merits.

3. The subsequent litigation was the first opportunity for the taxpayer to adjudicate the merits of his liability before a court of competent jurisdiction. Upon the first appeal the cause was reversed because the plea did not fully set forth the sources by which this test was to be applied. Upon remand a complete record was made and we are compelled to hold that the plea as amended fails to reveal a prior judgment between the same parties involving the merits of the controversy. Viator *v.* Stone, supra. The objections to the plea ought to have been sustained.

Reversed and remanded.

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APPENDIX "G"

IN THE SUPREME COURT OF MISSISSIPPI

No. 36642

(Opinion Rendered October 11, 1948)

EDDIE J. VIATOR

vs.

STONE

IN BANC

McGEHEE, Justice

Pursuant to the authority of Sections 10120, 10121 and 10122, Code 1942, relating to additional assessments of sales taxes by the State Tax Commission where there is an alleged failure to preserve adequate records of gross income, gross receipts, or gross proceeds of sales by any person engaged in any business for which a privilege tax is imposed by such sales tax law, there was such an additional assessment made by the State Tax Commission for the years of 1937 and 1938 against the appellant, Eddie J. Viator in excess of $3,000.00, and this Court held in the case of Viator *v.* State Commission, 193, Miss. 266, 5 So. 2d 487, 489, that the assessment sufficiently complies with requirements of the foregoing Code sections, and that "it became thereby prima facie correct, and the taxpayer was given an opportunity both by the Tax Commission and by the State Tax Commission itself to negative by evidence the facts on which the assessment was based."

Section 10122, Code 1942, supra, provides, among other things, that if any person feels aggrieved by such additional assessment, and who has been "improperly charged with any tax and required to pay the same, may recover the amount paid, together with interest, in any proper action or suit against the Commissioner, and the circuit court of the county in which the taxpayer resides or is located shall have original jurisdiction of any action to

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cover (evidently meaning recover) any tax improperly collected." Such payment is not required to be made under protest in order to entitle the taxpayer to sue under this statute.

The question now before us on this suggestion of error (and to which our attention has not been specifically directed heretofore on any of the several appeals in suits filed subsequently to the rendition of the decision in Viator *v.* Stone, infra, as shown in the cases of Viator *v.* Edwins, sheriff, etc., 195 Miss. 220, 14 So. 2d 212; Viator *v.* Stone, Chairman of State Tax Commission, 201 Miss. 487, 29 So. 2d 274, 658, including the original presentation of this one as reported in 33 So. 2d 310 and involving the alleged right of the taxpayer to recover the money paid by him pursuant to the final judgment of this Court rendered in the case of Viator *v.* State Tax Commission, supra) is whether or not the said Section 10122 has any application to the suit that is now sought to be maintained by the taxpayer in the Circuit Court of the County of his residence.

After the hearings before the Tax Commission which are mentioned in the opinion of this Court in Viator *v.* State Tax Commission, 193 Miss. 266, 5 So. 2d 487, supra, when using the language hereinbefore quoted, were had, the taxpayer did not pay the amount of such additional assessment, as required by the order of the Commission, and then file his suit in the Circuit Court of the County of his residence to recover the same, but instead of doing so he prosecuted an appeal from the said assessment to the Circuit Court of Hinds County of the county, wherein the office of the State Tax Commission is maintained. This appeal was by certiorari, and, of course, involved the question of whether or not the assessment was valid and the taxpayer liable for the tax on the face of the record of the proceedings had before the Tax Commission under the law involved.

On the hearing in the Circuit Court the assessment was approved and affirmed and a judgment was duly rendered against the appellant Viator and the sureties on his appeal bond for the amount thereof, together with the interest and penalties provided for and costs. An appeal was prosecuted from that judgment under a supersedeas bond

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to this Court, where the said judgment was duly affirmed as reported in the case of Viator *v.* State Tax Commission, cited in the last preceding paragraph, and a judgment was duly entered by this Court against the appellant and his sureties on that appeal bond for the full amount involved, together with five percent damages thereon, as allowed by statute for an unsuccessful appeal in such cases, and the interest which had accrued in the meantime, as well as the costs of the said appeal here.

An appeal from that judgment of this Court was prosecuted to the Supreme Court of the United States and was in effect, affirmed, the said Federal Supreme Court having denied certiorari, 316 U. S. 644, 62 S. Ct. 1109, 86 L. Ed. 1728, on the ground that no federal question was involved, that is to say, that Court likewise rejected the contention of the taxpayer as to the unconstitutionality of the Sales Tax Law as applied to him in the action and procedure adopted by the State Tax Commission, leading up to and including the making and entry of the assessment complained of, and in effect held that there had been no denial of due process of law.

However, there followed the suit of Viator *v.* Edwins, Sheriff et al., supra, wherein this Court reaffirmed what had been said in Viator *v.* State Tax Commission, 193 Miss. 266, 5 So. 2d 487, and among other things stated (195 Miss. 220, 14 So. 2d 213), "The instant proceeding therefore constitutes an attempt to show what might have been shown in the former cause. The contentions here made are identical and represent a continued attack upon the authority of the State Tax Commission and the validity of the former judgment." (Meaning the former judgment rendered by this Court in the case of Viator *v.* Stone, last above mentioned).

The suit by the taxpayer against the said Edwins, Sheriff, above mentioned, was in the Chancery Court to enjoin the collection of the final judgment of this Court, and in holding on appeal here that such a suit could not be maintained we said that "the taxes against the collection of which the injunction was sought are, in view of our former decision, not 'attempted to be collected without

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authority of law.'" That suit was not, of course, one brought under Section 10122, Code 1942, to recover any amount paid either to the Commissioner or in satisfaction of the final judgment of this Court; that is to say, it was on the other hand a suit to prevent the collection of the amount due under the judgment rendered by us.

There was also an appeal to the Supreme Court of the United States from the decision in Viator *v.* Edwins, supra, but with no avail to the taxpayer.

At some time during the several intervening years since the making of the said additional assessment it appears that the taxpayer has also litigated the matter with the Tax Commission in the Federal District and Circuit Court of Appeals and without success.

Following the last of the said appeals to the Supreme Court of the United States, the appellant on June 23, 1945, paid the final judgment rendered in Viator *v.* State Tax Commission, 193 Miss. 266, 5 So. 2d 487, supra, including the five percent damages and interest added to the judgment of the Circuit Court therein appealed from. The declaration herein alleges that "on the 23rd day of June, 1945, plaintiff was improperly charged with and required to pay additional sales tax for the years 1937 and 1938 in the sum and amount of $3,818.77," whereas it appears from the record made on the hearing of the plea of res adjudicata he was required to pay instead a judgment of this Court in said amount, and is not in position to say that was improperly charged therewith on the alleged ground that the taxes theretofore assessed were "unlawful, illegal and unconstitutional."

After paying the judgment aforesaid, the appellant filed the present suit in the Circuit Court of Harrison County, where he resides not for the purpose of recovering an amount paid pursuant to Section 10122, Code 1942, supra, as aforesaid, in discharge of the order of assessment made by the State Tax Commission, but rather in discharge of the said final judgment rendered by this Court—a liability which he and the sureties on his appeal bond in that case had obliged themselves by contract to satisfy in the event of an adverse decision on the said appeal.

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At any rate, we have reached the conclusion after a careful consideration of the question now before us that any right growing out of this additional assessment that the taxpayer may have had under Section 10122, supra, to sue the Commission has been merged into the judgment rendered by the Circuit Court of Hinds County on certiorari and the judgment rendered by the Circuit Court of Hinds County on certiorari and the judgment of affirmance thereof by this Court; that the judgment then rendered by this Court is binding upon the appellant because of its finality, whether correct or not on the issue of liability involved; that the said judgment existed as a valid asset belonging to the State until fully paid and satisfied; and that this Court has had no power to disturb or recall the same at any time since we overruled the suggestion of error in the case and our action in so doing was affirmed by the Supreme Court of the United States.

To construe Section 10122, supra, so as to permit the recovery herein sought would lead to results that were unthought of when this statute was enacted whereby the right to sue the State Tax Commission for a refund was granted. The appellant for several years superseded the right of the Tax Commission to enforce the collection of the assessment, and saw fit to test his liability under the law, instead of on the facts, until such time as his right to have the factual issue determined had become merged into the final judgment against him.

It, therefore, follows that the suggestion of error must be sustained and the action of the Circuit Court of Harrison County in sustaining the plea of res adjudicata to the present suit, and dismissing the same, should be affirmed.

Suggestion of error sustained.

APRIL 18, 1949.

Per Curiam Decisions.

No. 613. VIATOR *v.* STONE, CHAIRMAN, STATE TAX COMMISSION OF MISSISSIPPI, ET AL. Appeal from the Supreme Court of Mississippi. *Per Curiam:* The appeal is dismissed for the reason that the judgment of the court below is based upon a non-federal ground adequate to support it. *Albert Sidney Johnston, Jr.* and *Weaver E. Gore* for appellant. Reported below: 203 Miss. 109, 37 So. 2d 1.

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